No. 80-1087

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In the Supreme Court of the United States

OCTOBER TERM, 1980

ELLIS FISCHEL STATE CANCER HOSPITAL, PETITIONER

v.

RAYMOND J. DONOVAN, SECRETARY OF LABOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the Secretary of Labor's administrative proceedings and remedial order against petitioner, a state hospital, are barred by the Eleventh Amendment.

2. Whether the Secretary's findings and remedial order are supported by substantial evidence.

3. Whether the Nuclear Regulatory Commission regulation violated by petitioner exceeds the NRC's authority under 42 U.S.C. 2134 and (& Supp. III) 5851.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A-9 to A-16) is reported at 629 F. 2d 563.

JURISDICTION

The judgment of the court of appeals was entered on September 11, 1980. The petition for a writ of certiorari was filed on December 8, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner Ellis Fischel State Cancer Hospital, a Missouri state facility, is licensed by the Nuclear Regulatory Commission to use radioactive material in medical diagnosis and therapy. Dr. Clifford Richter was hired in 1974 as petitioner's chief medical physicist. As the hospital radiation safety officer, Dr. Richter was assigned the task of

reporting to the NRC on petitioner's use of radioactive material (Pet. App. A-2 to A-3, A-10).

On March 28, 1978, a technician at the hospital examined a cancer patient who had been discharged three months earlier. The technician discovered that four seeds of iridium-192, a radioactive isotope, had been unintentionally left in the patient's body when she was discharged. (The seeds had been implanted as part of the patient's therapy.) The results of the examination were immediately reported to Dr. Richter in his capacity as radiation safety officer. The following day, Dr. Richter reported the incident to the NRC by telephone. The NRC found that the failure to remove the iridium violated condition No. 18 of the hospital's NRC license and 10 C.F.R. 35.14(b)(5)(vii) (Pet. App. A-3, A-10).[1]

Before his report to the NRC, Dr. Richter had consistently received extremely favorable work evaluations. In fact, in January 1978, the hospital administrator recommended that Dr. Richter be given a 39% increase in salary (Pet. App. A-3, A-11). Six days after Dr. Richter's report, however, the hospital executive committee met and critically discussed the medical physics department. Although Dr. Richter was a member of the executive committee, he was excluded from the meeting (*id.* at A-11).

From April through August 1978, Dr. Richter received three progressively less favorable evaluations of his work (Pet. App. A-11). On April 24, 1978, the hospital administrator wrote a memorandum to Dr. Richter, admonishing

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[1]The regulation requires that patients treated with iridium-192 implants remain hospitalized "until a source count and a radiation survey * * * confirm that all implants have been removed."

The NRC report also concluded that persons who came into contact with the patient were exposed to significant amounts of radiation but that the exposure was within allowable limits (Pet. App. A-10).

him for making the report to the NRC without first clearing it with the hospital administration and staff (Pet. App. A-3 to A-4). At approximately the same time, the executive committee, again meeting in Dr. Richter's absence, abolished the Medical Physics Department and made it a division within the Department of Radiation Therapy (*id.* at A-4, A-11). The minutes of an executive committee meeting in July 1978 contain the following statement (*id.* at A-11): "Apparently Dr. Richter is not going to resign despite his statement that he would if he lost his departmental director position." Also during the summer of 1978, after the hospital staff connected Dr. Richter to a newspaper article concerning storage of radioactive materials at the hospital, Dr. Richter was suspended for three days without pay and formally reprimanded for " 'fail[ing] to extend to the staff and administration * * * the professional courtesy to follow normal procedures in bringing problems to the attention of those persons ultimately responsible for the operation of the hospital' " (*ibid.*).

In October 1978, without consulting either Dr. Richter or Dr. Nestor Canoy, head of the Department of Radiation Therapy, the executive committee and hospital staff reorganized the Department to eliminate the chief physicist position occupied by Dr. Richter. In December 1978, Dr. Richter was notified that his position had been abolished and that he therefore would be terminated as an employee of the hospital (Pet. App. A-4). The Department of Radiation Therapy was reorganized into three medical teams, the division of medical physics was eliminated, and each of the two junior medical physicists at the hospital was assigned to one of the newly-created medical teams. Dr. Richter was not assigned to a team, even though he was the senior medical physicist, and even though Dr. Canoy testified that after Dr. Richter was dismissed the hospital did not have enough medical physicists (Pet. 9; Pet. App. A-11 to A-12).

2. Following his dismissal, Dr. Richter filed a complaint with the NRC, alleging that his employment had been terminated in retaliation for his report of the iridium incident. After an evidentiary hearing, an administrative law judge found that Dr. Richter was discharged because of his report to the NRC and that his firing therefore violated 42 U.S.C. (Supp. III) 5851(a) (Pet. App. A-5 to A-6). The administrative law judge recommended that Dr. Richter be restored to his position as chief medical physicist, that he recover back pay and attorney's fees, and that any adverse references added to his file after March 1978 be deleted (*id.* at A-6). The Secretary of Labor adopted the administrative law judge's findings and recommended decision and issued the recommended order, pursuant to 42 U.S.C. (Supp. III) 5851(b)(2)(B) (Pet. App. A-7 to A-8).

The court of appeals affirmed (Pet. App. A-9 to A-16), rejecting each of the arguments that petitioner now advances in this Court. The court of appeals ruled that the Secretary's order does not violate the Eleventh Amendment (*id.* at A-14 to A-15), that the order is supported by substantial evidence and is not arbitrary or capricious (*id.* at A-13), and that the Secretary's action does not exceed the scope of his authority under 42 U.S.C. 2134(a) and (& Supp. III) 5851 (*id.* at A-14 n.4).

ARGUMENT

The court of appeals' decision is clearly correct, and there is no conflict among the circuits on any of the questions presented by petitioner. Further review by this Court is not warranted.

1. Petitioner first contends (Pet. 11-16) that the administrative proceeding conducted by the Secretary and the resulting remedial order violate the Eleventh Amendment. The short answer to this argument is that the Eleventh Amendment says nothing about suits by the United States, its agencies, or its officers acting in their official capacity.

The Amendment confers an immunity that extends only to suits brought by private citizens. See generally *Employees* v. *Missouri Public Health Dept.*, 411 U.S. 279, 285-286 (1973); *United States* v. *Mississippi*, 380 U.S. 128, 140-141 (1965). Although petitioner purports (Pet. 15) to have identified an inconsistency among the decisions of the courts of appeals in this regard, no such conflict exists.[2] On the contrary, the circuits are uniform in their holding that the Eleventh Amendment does not bar actions brought against the states by federal administrative agencies pursuant to complaints of private persons. See, *e.g.*, *Marshall* v. *A & M Consolidated Independent School District*, 605 F. 2d 186 (5th Cir. 1979); *Brennan* v. *Iowa*, 494 F. 2d 100 (8th Cir. 1974), cert. denied, 421 U.S. 1015 (1975); *Brennan* v. *Indiana*, 517 F. 2d 1179 (7th Cir. 1975), vacated on other grounds, 427 U.S. 909 (1976); *Fitzpatrick* v. *Bitzer*, 519 F. 2d 559 (2d Cir. 1975), aff'd in part, rev'd in part on other grounds, 427 U.S. 445 (1976); *District of Columbia* v. *Train*, 521 F. 2d 971 (D.C. Cir. 1975). And, as the court of appeals concluded, if the Eleventh Amendment does not bar the Secretary from bringing a lawsuit, "it would be absurd to hold" that the Amendment does preclude the Secretary "from proceeding administratively to determine if [a] lawsuit [is] warranted" (Pet. App. A-15). Petitioner's suggestion that the Eleventh Amendment prohibits administrative enforcement of 42 U.S.C. (Supp. III) 5851 is therefore without merit.

2. Petitioner also argues (Pet. 17-19) that the Secretary's findings with respect to the reasons for Dr. Richter's dis-

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[2] *Littell* v. *Morton*, 445 F. 2d 1207 (4th Cir. 1971), on which petitioner relies, does not involve the Eleventh Amendment at all. A private citizen sought review under the Administrative Procedure Act of action taken by the Secretary of the Interior, and the court of appeals addressed the question whether sovereign immunity might bar judicial review, even in situations where review appeared to be authorized by the APA. The case has no bearing on the question whether the states' immunity under the Eleventh Amendment extends to suits brought by the United States, its agencies, or its officers.

charge are not supported by substantial evidence and are arbitrary and capricious. As the court of appeals concluded (Pet. App. A-13), "[n]o lengthy discussion is needed to dispose of these arguments; the largely undisputed chronology of events * * * provides substantial support for the Secretary's order." Notwithstanding the testimony of petitioner's witnesses that Dr. Richter was not dismissed in retaliation for his report to the NRC, the Secretary and the court of appeals both were convinced that the abrupt change in the hospital administration's attitude toward Dr. Richter could be explained in no other way. In the court of appeals' words (*id.* at A-14),

> [w]e cannot find in the record any plausible explanation which does not include some element of retaliation for the proceedings against Dr. Richter six days after the Commission report, the sudden decline in Dr. Richter's evaluations and the decision to terminate him during a staff reorganization in which two less senior medical physicists were retained.

Moreover, petitioner's "substantial evidence" argument presents a completely fact-bound question that would not merit review in this Court, even if the support in the record for the Secretary's decision were considerably less weighty than it is.

3. Finally, petitioner asserts (Pet. 19-21) that the Secretary's action exceeds his authority under 42 U.S.C. (Supp. III) 5851 because Dr. Richter's reinstatement will not "promote the common defense and security." Petitioner has taken the quoted phrase from 42 U.S.C. 2134, which directs the NRC, in issuing licenses for the use of radioactive materials in medical therapy, to "impose the minimum amount of regulation consistent with its obligations * * * to promote the common defense and security and to protect the health and safety of the public." Petitioner's position apparently is that, unless a particular regulatory action

demonstrably advances *both* the "common defense and security" and the "health and safety of the public," it is not authorized by the relevant statutes.

The court of appeals correctly determined that "this argument is frivolous" (Pet. App. A-14 n.4). The NRC's regulation requiring that persons being treated with iridium-192 implants remain hospitalized until all implants have been removed is clearly designed to protect the public health and safety, and no further justification for the regulation is required under 42 U.S.C. 2134. Despite petitioner's contrary interpretation, that statute does not mean that NRC regulations regarding radiation therapy are invalid unless they serve both defense and health purposes. Regulations advancing either security or safety objectives are permitted by Section 2134.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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